

➤ **China**

Doing business in China poses special challenges pertaining to the FCPA compliance. Companies operating out of China need to be vigilant about mitigating risks and avoid the FCPA minefield. In the recent past DOJ, SEC and anti-corruption bodies of other countries have aggressively targeted China.

Between 2006 – 2011 nearly 20 cases were brought by enforcement agencies for corporates operating out of China.¹ In 2012 alone there were 15 cases under FCPA on companies operating out of China. Nearly one-third of the FCPA enforcement actions filed in 2012 involved allegations of corrupt payments in China, a statistic which is consistent with the curve seen in prior years.²

I. **Special FCPA concerns on doing business in China³**

- A. Chinese business operates on building close networks and relationships known as “Guanxi” involving entertaining, traditional gift giving, sharing meals etc
- B. China has a business culture that tolerates petty corruption in the form of kickbacks, payoffs, gifts, and favors given in order to secure a business advantage or to build or fortify a business relationships
- C. China has a majority of state owned enterprises (SOEs) and state controlled enterprises and it is essential to build “Guanxi” with officials working in these SOEs
- D. Aggressive anti-corruption enforcement in China by United States and other countries
- E. Interpretation in China of “foreign official” under FCPA. Both Department of Justice (DOJ) and SEC aggressively considers “foreign official as any employee of the government or its instrumentality or even any private person acting on the behalf of the government
- F. China being a one party authoritarian state many persons that appear to be private or ordinary business persons will qualify as foreign officials⁴

II. **Boundaries under the FCPA⁵**

¹ Covington & Burling LLP, “*Global Anticorruption*”, November 2012. Pg 4. URL: http://www.cov.com/files/Publication/ee200192-e711-47dc-8cd5-15bcaf4bd1f1/Presentation/PublicationAttachment/d362277c-d835-43e0-93fc-183a0f809dae/Trends_and_Developments_in_Anti-Corruption_Enforcement.pdf

²Securities and Exchange Commission, “*Year-by-Year SEC Enforcement Statistics*”, Pg 1. URL: <http://www.sec.gov/news/newsroom/images/enfstats.pdf>

³ Chow, Daniel, “*China under the foreign corrupt practices act*”, Wisconsin Law Review, 2012, pg 576. URL: <http://wisconsinlawreview.org/wp-content/files/12-Chow.pdf>

⁴ Chow, Daniel, “*The interplay between China’s anti-bribery laws and the foreign corrupt practices act*”. Ohio State Law Journal, Volume 73, No 5. Pg 1021. URL: http://moritzlaw.osu.edu/students/groups/oslj/files/2013/02/73.5.Chow_.pdf

⁵ Clifford Chance, “*Grease, gift or graft ? Boundaries of business courtesies in China*”, June 2011. Pg 2. URL: http://www.cliffordchance.com/content/dam/cliffordchance/PDF/Grease_gift_or_graft_-

- A. Within certain boundaries, the gifts so critical to building Guanxi – including cash, travel, and entertainment – are permitted under the FCPA. There are business courtesy exceptions that regulators recognize do not necessarily imply a corrupt intent
- B. “Grease payments” fall under the FCPA exception for “facilitating payments” if intended to “expedite or to secure the performance of a routine governmental action.”
- C. US based MNC establishing a Wholly Foreign Owned Enterprise (WFOE) against to forming a joint venture, might be protected by the special legal status accorded to it by Chinese law i.e. principals of limited liability. WFOE is a separate legal entity from the MNC that own it. DOJ / SEC may consider it differently and make the WFOE also liable, this is a grey area in the FCPA law
- D. Third-Party Intermediaries or Contractors and Pass-through Payments: these third parties often engage in giving bribes to PRC officials such as judges, police and administrative authorities. DOJ considers these as violations to FCPA

III. **Boundaries under anti-bribery laws in China⁶**

In contrast, under the PRC Criminal Law, the Supreme People’s Procuratorate (SPP) has adopted value thresholds for criminal bribery:

- RMB5,000 (approx. USD 750) or above for an individual who accepts a bribe
- RMB100,000 (approx. USD 15,000) or above for a state institution that accepts a bribe
- RMB10,000 (approx. USD 1,500) or above for an individual offering a bribe and
- RMB200,000 (approx. USD 30,000) or above for an entity offering a bribe

Bribery below the thresholds will only be considered criminal in specified circumstances – for example, bribes paid to three or more State officials or State-related institutions, or where the bribery causes severe damage to national/social interests. Accordingly, business courtesies below these thresholds should not give rise to prosecution absent such aggravating circumstances.

Due to a number of overlapping elements contained in China’s commercial bribery laws and the FCPA, violations of China’s commercial bribery laws can in many instances also be violations of the FCPA. This poses great risk to MNCs.⁷

[Boundaries_of_business_courtesies_in_China_new.pdf](#)

⁶ibid.

⁷Warin, Joseph F; Diamant, Michael S; Pfenning, Jill M, “FCPA compliance in China and the gifts and hospitality challenge” Virginia Law & Business Review, Volume 5, Number 1, Spring 2010. Pg 35. URL: <http://media.gibsondunn.com/publications/Documents/Warin-Diamant-FCPAComplianceInChina.pdf>

IV. Enforcement trends in China

Some recent cases in China illustrate the serious focus and resolve that the US government is showing towards corruption emanating from there.

“US enforcement authorities settled four cases in 2011 involving conduct related in whole or in part to China (Maxwell Technologies, IBM, Rockwell, and Watts Water). This follows five China-related cases in 2010, four cases in 2009, four cases in 2008, and six cases prior to 2008. Eight individuals also have been prosecuted to date for alleged China-related FCPA violations. An additional 15 companies have publicly disclosed China-related FCPA investigations. Given the steady stream of multinationals expanding into or within China, we anticipate this trend of China-related investigations and settled enforcement actions will continue in 2012 and beyond.”⁸

V. China FCPA Enforcement Trend: Third-Party Risks

SEC v. Maxwell Technologies Inc. (D.D.C. 2011)

“Maxwell S.A. allegedly paid more than USD 2.5 million to a third-party sales agent in China to secure sales contracts for high-voltage capacitors with Chinese state-owned manufacturers of electrical-utility infrastructure. The complaint alleges that the agent accomplished these payments by inflating purchase orders by 20%, then distributing the extra amount to officials at the state-owned entities. Maxwell accounted for these fees as commission expenses in Maxwell’s books and records. Maxwell’s U.S. management discovered the bribery scheme in late 2002.⁹ On January 31, 2011, Maxwell resolved the matter with the DOJ by entering into a deferred prosecution agreement under which the company agreed to pay USD 8 million in criminal penalties (payable in installments), and implement an enhanced compliance program and internal controls. Maxwell simultaneously reached a settlement with the SEC and agreed to disgorge over USD 5.6 million in profits.”¹⁰

United States v. The NORDAM Group, Inc. (2012)

⁸Covington & Burling LLP, “*Global Anticorruption*”, November 2012. Pg 4. URL: http://www.cov.com/files/Publication/ee200192-e711-47dc-8cd5-15bcaf4bd1f1/Presentation/PublicationAttachment/d362277c-d835-43e0-93fc-183a0f809dae/Trends_and_Developments_in_Anti-Corruption_Enforcement.pdf.

⁹ Shearman & Sterling LLP, “*FCPA Case Digest*”, January 2013. Pg 34. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

¹⁰Law360, “*China Remains An FCPA Hot Spot*”, February 24, 2011. Pg 2. URL: <http://www.fulbright.com/images/publications/20110224ChinaRemainsAnFCPAHotSpot.pdf>

“Between 1999 and 2008, employees of NORDAM allegedly paid bribes totaling USD 1.5 million to employees of airlines controlled and owned by the People’s Republic of China to secure contracts to perform MRO services for those airlines.

The bribes paid both directly and indirectly to airline employees were referred to internally as “commissions” or “facilitator fees.” These facilitator fees were paid to “facilitators,” who were the actual employees of NORDAM’s customers. In an effort to disguise the bribes, three employees of NORDAM’s affiliate entered into sales representation agreements with fictitious entities and then used the money paid by NORDAM to those entities to pay bribes to the airlines employees. On July 17, 2012, NORDAM entered into a three-year non-prosecution agreement with the DOJ. As part of that agreement, NORDAM is required to cease and desist from further violating the books and records and internal controls provisions of the FCPA and pay a penalty of USD 2 million. In addition to the monetary penalty, NORDAM must adhere to rigorous compliance, bookkeeping, and internal controls standards and cooperate fully with the DOJ.”¹¹

United States v. Biomet, Inc. (D.D.C. 2012)

“From approximately 2000 to 2008, Biomet, its subsidiaries, employees, and agents made various improper payments to health care providers employed at publicly owned and operated hospitals in China to secure lucrative business for sales of Biomet products to hospitals. In China, Biomet employees paid bribes through a Chinese distributor who provided doctors with money and travel in exchange for their purchases of Biomet products. These allegations include payments of “consulting fees” of between 5 and 20 percent of sales, with one surgeon receiving 25 percent upon completion of a surgery. Additionally, Biomet provided a dinner for a doctor, followed by a possible trip to Switzerland to visit his daughter and organized a trip for 20 surgeons to Spain for training, where a substantial portion of the trip was devoted to sightseeing and entertainment at Biomet’s expense.”¹² On March 26, 2012 Biomet entered into a three-year deferred prosecution agreement under which Biomet agreed to pay a monetary penalty of USD 17.28 million. Additionally, Biomet agreed to retain an independent corporate compliance monitor for a minimum period of 18 months and to self-monitor and report for the remainder of the DPA period. Also for the civil liability suit filed against it “Biomet consented to the entry of a court order permanently enjoining it from any future FCPA violations

¹¹Shearman & Sterling LLP, “FCPA Case Digest”, January 2013. Pg 41. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

¹²Shearman & Sterling LLP, “FCPA Case Digest”, January 2013. Pg 45. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

and agreed to pay disgorgement and prejudgment interest totaling USD 5.57 million.”¹³

A. Key Lessons for Third-Party Risks enforcements in China

“Although use of third parties is often a useful, and sometimes necessary, part of doing business in an emerging market, it will often present corruption risks. Conduct due diligence on third parties in high-risk countries, actively monitor third-party behavior during the relationship, and insist upon absolute integrity when dealing with foreign government officials.

Watch for red flags when dealing with third parties in China:

- Unexplained increases in purchase prices
- Generic or unsatisfactorily explained invoices
- Inflated commission or fee arrangements
- Payments of money through indirect channels
- Hiring employees who are connected or related to government officials
- Excessive travel and entertainment expenses.
- Third party domiciled in a country other than the one where it provides services

Common Third Parties to Watch in the PRC:

- Consultants
- Design Institutes
- PR/Marketing Firms
- Event Organizers
- Travel Agents
- Import/Export Companies
- Distributors & Dealers”¹⁴

Some examples for third-party risks are SEC v. Tyco International Ltd. (D.D.C. 2012) and SEC v. Rockwell Automation, Inc. (2011) referred in SEC Accounting and Auditing Enforcement Release No. 64380 (May 3, 2011); Admin Pro. File. No. 3-14364.

VI. China FCPA Enforcement Trend: Gift Giving

SEC v. Pfizer Inc., No. 1:12-cv-01303 (D.D.C. 2012)

¹³ibid.

¹⁴ Strafford, “Anti-Corruption enforcement in China on the rise: Minimizing risk of FCPA and Chinese law violations and responding to investigations”. Web presentation, 5 March 2013 (Key speakers: Diamant, Michael S.; Hunt, Robert; Michael Li-Ming Wong). Pg. 30. URL: <http://media.straffordpub.com/products/anti-corruption-enforcement-in-china-on-the-rise-2013-03-05/presentation.pdf>

“In China, Pfizer’s Chinese subsidiary provided cash, hospitality, gifts, and support for international travel to doctors who were employed by Chinese government healthcare institutions. The payments were intended to influence these officials to prescribe Pfizer products, provide hospital formulary listings, and otherwise use their influence to grant Pfizer China an unfair business advantage. On August 28, 2012, Pfizer Inc. consented to a final judgment, under which it was permanently restrained and enjoined from violating the FCPA and ordered to pay disgorgement and prejudgment interest of USD 26,339,944.84. Pfizer was also ordered to periodically report to the SEC regarding its remediation and implementation of compliance measures.”¹⁵

SEC v. Eli Lilly and Co., No. 1:12-cv-02045 (D.D.C. 2012)

“According to the SEC’s complaint, between 1994 and 2009, Eli Lilly’s subsidiaries made improper payments to government officials in China, Brazil, Poland, and Russia, to win sales contracts and gain other business advantages.

In China, employees at Eli Lilly’s Chinese subsidiary (“Lilly-China”) allegedly submitted false expense reports to purchase gifts and entertainment for government-employed physicians to encourage physicians to look favorably upon Lilly and prescribe Lilly products. In December 2012 Eli Lilly agreed to pay disgorgement and prejudgment interest of approximately USD 20.7 million, and a penalty of USD 8.7 million. Lilly also agreed to comply with certain undertakings, including the retention of an independent consultant to review and make recommendations about its foreign corruption policies and procedures.”¹⁶

A. Key Lessons for gift giving enforcements in China

“Be aware of cultural conditions that may present risks. Closely monitor the provision of gifts, entertainment, and other business hospitality, especially around local holidays. Recent enforcement actions involving China show continued focus on abuses of the region’s gift-giving culture.”¹⁷

¹⁵Shearman & Sterling LLP, “FCPA Case Digest”, January 2013. Pg 255. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

¹⁶Shearman & Sterling LLP, “FCPA Case Digest”, January 2013. Pg 249. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

¹⁷Strafford, “Anti-Corruption enforcement in China on the rise: Minimizing risk of FCPA and Chinese law violations and responding to investigations”. Web presentation, 5 March 2013 (Key speakers: Diamant, Michael S.; Hunt, Robert; Michael Li-Ming Wong). Pg. 32. URL: <http://media.straffordpub.com/products/anti-corruption-enforcement-in-china-on-the-rise-2013-03-05/presentation.pdf>

Some examples for gift giving are *United States v. Biomet, Inc.* (D.D.C. 2012); *United States v. RAE Systems Inc.* (D.D.C. 2010) and *United states v. Schnitzer Steel Industries, Inc.* (2006)

VII. **China FCPA Enforcement Trend: Pre-Acquisition Due Diligence**

SEC v. Wyeth LLC, No. 1:12-cv-01304 (D.D.C. 2012)

“In 2009, during Wyeth’s alleged misconduct, the company was acquired by Pfizer, Inc. and became a wholly-owned subsidiary of Pfizer. The DOJ’s action against Pfizer H.C.P. (and the related SEC action against Pfizer Inc.) is wholly unrelated to the conduct alleged by the SEC in this action.

In China, Wyeth’s indirect majority-owned subsidiary, Shanghai Wyeth Nutritional Co., Ltd., provided cash payments to Chinese state-owned hospitals and healthcare providers employed by the Chinese government. The payments were made to influence the healthcare providers’ recommendations of Wyeth nutritional products to patients, to ensure that Wyeth products were made available to new mothers at the hospitals, and to obtain information on new births that could be used for marketing purposes. The payments were funded with the help of collusive travel agencies, and by submitting falsified expense reimbursement requests, which were either inflated or related to events that did not occur. On August 7, 2012, the SEC filed a complaint against Wyeth, alleging violations of the books-and-records and internal controls provisions of the FCPA. Wyeth consented to entry of a final judgment on August 29, 2012, under which Wyeth was ordered to pay disgorgement and prejudgment interest of USD 18.8 million.”¹⁸

A. Key Lessons for due diligence enforcements in China

“Effective and probing pre-acquisition due diligence is a must in order to avoid inheriting the FCPA liability of newly acquired businesses. In the Pfizer/Wyeth case, due diligence is underscored as a must in order to avoid inheriting the FCPA liability of newly acquired businesses.

- Following Pfizer’s 2009 acquisition of Wyeth, its due diligence review found potential improper payments, prompting SEC and DOJ investigations
- Wyeth paid USD 18.8 million to resolve the SEC charges
- DOJ declined to pursue charges against Pfizer, citing its due diligence and the prompt implementation of internal controls in Wyeth’s entities”¹⁹

¹⁸Shearman & Sterling LLP, “FCPA Case Digest”, January 2013. Pg 257. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

¹⁹Strafford, “Anti-Corruption enforcement in China on the rise: Minimizing risk of FCPA and Chinese law violations and responding to investigations”. Web presentation, 5 March 2013

VIII. **China FCPA Enforcement Trend: Scrutiny of Compliance Programs**

Recent cases show that U.S. enforcement agencies will factor in a company's compliance program when determining whether to commence an enforcement action.

SEC v. Garth Peterson (E.D.N.Y. 2012)

"Garth Peterson was a managing director in charge of Morgan Stanley's Real Estate Group's ("MSRE") Shanghai office. According to the SEC's complaint, from at least 2004 to 2007, Peterson secretly acquired millions of dollars' worth of real estate investments from Morgan Stanley's funds for himself and for the former Chairman of Yongye (the "Chinese Official"). Yongye was a state-owned entity with influence over the success of Morgan Stanley's real estate business in China, Peterson had a pre-existing business and personal relationship with the Chinese Official. Peterson also arranged to have paid to himself and the Chinese Official at least \$1.8 million in what he misrepresented were finders' fees Morgan Stanley's funds owed to third parties. In exchange for offers and payments from Peterson, the Chinese Official helped Peterson and Morgan Stanley to obtain business while personally benefitting from some of these same investments. Peterson settled with the SEC, and the court entered a final judgment against Peterson, ordering him to disgorge approximately USD 3.82 million (comprised of his shares in the investment vehicle, worth USD 3.4 million, USD 241,589 in cash, and prejudgment interest)."²⁰

A. Key Lessons for due diligence enforcements in China

"The SEC and DOJ both declined to accuse Morgan Stanley of any wrongdoing, and cited the company's robust FCPA compliance program and internal controls."²¹

The key finding from reading cases and enforcement actions taken by the authorities is that mitigating FCPA risks would be a prime challenge in doing business in China. Companies should mitigate these challenges by creating and adhering to robust policies and procedures pertaining to due diligence, compliance

(Key speakers: Diamant, Michael S.; Hunt, Robert; Michael Li-Ming Wong). Pg. 29. URL: <http://media.straffordpub.com/products/anti-corruption-enforcement-in-china-on-the-rise-2013-03-05/presentation.pdf>

²⁰Shearman & Sterling LLP, "FCPA Case Digest", January 2013. Pg 260. URL: http://www.shearman.com/files/Publication/287c1af0-f9cb-4c11-805d-91c409975b41/Presentation/PublicationAttachment/83d9dc0b-b80c-4ca4-877b-9efbba0952e7/FCPA-Digest-Jan2013_010213.pdf

²¹Strafford, "Anti-Corruption enforcement in China on the rise: Minimizing risk of FCPA and Chinese law violations and responding to investigations". Web presentation, 5 March 2013 (Key speakers: Diamant, Michael S.; Hunt, Robert; Michael Li-Ming Wong). Pg. 34. URL: <http://media.straffordpub.com/products/anti-corruption-enforcement-in-china-on-the-rise-2013-03-05/presentation.pdf>

& internal controls, self reporting & disclosures and impeccable records management.

IX. E-Discovery challenges in China

“The first is to understand that the corporate culture in China does not compare to that of the U.S to any meaningful degree. American notions of preservation and legal hold simply do not exist in China. For example, many Chinese executives use their personal email addresses for work, share community computers and have no formal archiving or document retention capabilities. These practices create an e-discovery nightmare, fraught with complex questions about data privacy and state secrets. Although Chinese companies doing business in the U.S. are technically bound to comply with the Federal Rules of Civil Procedure, this fact will not change Chinese corporate culture.

Distinct from common law jurisdictions, the Chinese legal system does not explicitly allow for the discovery of information that either supports or damages the litigants’ claims. The law governing litigation in China—Civil Procedure Law—contains very different guidelines than those of other common law jurisdictions, which serve to restrict the scope of discovery. Although there is a trend to allow for the exchange of evidence in litigation, Chinese law does not require the exchange. Therefore, parties accustomed to American/UK-style e-discovery/e-disclosure cannot rely on discovery as a means of controlling litigation.

Another factor that limits the scope of discovery in China is the parties’ reluctance to disclose sensitive information that might be deemed a state secret. Divulgance of such information would amount to a violation of PRC law. With an increasing amount of cross-border litigation, the chances that such information would be exported outside of China are heightened; thus, parties have to pay particular attention to avoid fines or even criminal liabilities when seeking discovery. The definition of a state secret under PRC law includes a wide range of information and is more ambiguous than Western definitions about national security (for example, the Chinese definitions are less defined than those in the U.S. Patriot Act). Politically sensitive data is susceptible to the government’s scrutiny and protection, regardless of whether it is possessed by PRC citizens or officials working for foreign corporations.

Chinese courts are not necessarily sympathetic towards the discovery or investigatory requirements of U.S. regulatory bodies. For example, in the still unresolved Steven Jacobs v. Las Vegas Sands case, the defendant alleged that relevant ESI could not be produced because Chinese privacy and data protection laws prohibited the release of this information without the permission of local Chinese authorities.

Currently, the Supreme People's Court on Evidence in Civil Proceeding provides for the exchange of evidence in the following scenarios:

- The people's court may, on the basis of the application of one of the parties, arrange an exchange of evidence prior to the holding of any court hearing
- In any case involving a significant volume of evidence or relatively complex issues, the court shall arrange for the parties to exchange evidence following the expiration of the time period for reply

In practice though, the exchange of evidence in China is difficult because there is still a lack of clear guidance for the implementation of these rules.”²²

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²² Walton, Allison; Gonsowski, Dean. “Like the great wall: E-discovery barriers still exist between the US and China”, Inside Counsel, December 3, 2012. Pg. 1. URL:
http://www.insidecounsel.com/2012/12/03/like-the-great-wall-e-discovery-barriers-still-exi?ref=hp%3Futm_source%3Dic&utm_medium=email&utm_campaign=iccommentary&t=e-discovery

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